77-842

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1977

No.

JOHN P. DAVIS and NINA J. DAVIS,
Appellants

vs.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Respondent.

JURISDICTIONAL STATEMENT

JOHN P. DAVIS
P. O. Box 727
Minden, Nevada 89423

In propria persona

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No.

JOHN P. DAVIS and NINA J. DAVIS,
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vs.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Respondent.

On appeal from the Court of Appeals in and for the Third Appellate District for the State of California

JURISDICTIONAL STATEMENT

I

OPINION BELOW

The opinion of the Court of Appeals for the Third Appellate District is reported at 139 Cal. App. 3rd 797 and is set forth in the appendix pp. i to x.

II

JURISDICTION

Jurisdiction of this court is invoked pursuant to 28 U.S.C. Sec. 1257 (2), this being an appeal which draws into question the validity of Sec. 18243 of the Revenue and Taxation Code of California on the grounds that it is repugnant to the Constitution of the United States.

Appellants would have paid $1760.42 less in taxes during 1973 to the State of California if they had as non-residents been allowed to use income tax averaging as is allowed to residents who would have been residents for the entire base period of five years.

The Superior Court in and for the County of Sacramento, State of California, upheld the California Income Taxation Code provision by its decision entered on November 15, 1976. On appeal the judgment was upheld by the Court of Appeals in and for the Third Appellate District for the State of California in its decision filed on July 26, 1977. A petition for hearing in the Supreme Court

of California was denied on September 22, 1977. Timely notice of appeal to this court was filed in the Court of Appeals For the Third Appellate District for the State of California on October 31, 1977, subsequent to the California Supreme Court denying appellants' petition for hearing.

In the event that the court does not consider appeal the proper mode of review, appellant requests that the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. Sec. 2103.

III
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

This case involved the U.S. Constitution Art. IV Sec. 2 Par. 1.

This case also involved California Revenue and Taxation Code Sec. 18243 which allows income tax averaging for some residents but denies such averaging to all non-residents. The section states:

> Sec. 18243 (a) Except as otherwise provided in this section, for purposes of this article the term "eligible individual" means any individual who is a resident of this state throughout the computation year.
>
> (b) For purposes of this article, an individual shall not be an eligible individual for the computation year if, at any time during such year or base period, such individual was a non-resident.

IV
QUESTION PRESENTED

Whether Sec. 18243 of the California Revenue and Taxation Code violates the privileges and immunities clause of the U.S. Constitution.

V
STATEMENT OF CASE

With the exception of taxable year 1973, Plaintiffs

were residents of California during each of the taxable years relevant to this appeal, (1969, 1970, 1971 and 1972). For the taxable year 1973, Plaintiffs timely filed a non-resident California personal income tax return which indicated their present address as being Carson City, Nevada.

On May 9, 1974, Plaintiffs filed a claim for a refund of $1760.42 of the 1973 personal income taxes paid because of the provision of the Revenue and Taxation Code which allows income tax averaging for residents but denies such averaging to non-residents resulted in taxpayers paying $1760.42 more in taxes than if they would have been residents and allowed to use income averaging. The applicable sections of the California Income Taxation Code are as follows:

> Sec. 18243 (a) Except as otherwise provided in this section, for purposes of this article the term "eligible individual" means any individual who is a resident of this state throughout the computation year.
>
> (b) For purposes of this article, an individual shall not be an eligible individual for the computation year if, at any time during such year or base period, such individual was a non-resident.

The claim was denied on August 23, 1974 by the Franchise Tax Board. On August 30, 1974, Plaintiffs appealed to the State Board of Equalization which denied the claim on March 8, 1976. A subsequent petition for rehearing was denied on April 5, 1976.

A complaint was filed on April 22, 1976 in the Superior Court of the State of California in and for the County of Sacramento. Trial was held on October 27, 1976 and Judgment entered on November 15, 1976. The decision was affirmed by the Court of Appeals of the State of California in and for the Third Appellate District in its decision filed on July 26, 1977.

A timely petition to the California Supreme Court was filed and the petition was denied on September 22, 1977.

VI

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

A Federal question has been raised at every level of the proceedings and at each level they have been rejected by the Court's declaring there were valid independent reasons for upholding the taxing statute. Appellants' thrust is that more than merely showing a valid independent reason must be shown and that the additional burden if any, to the State must be equated at least approximately to the burden placed on the taxpayer.

VII

THE FEDERAL QUESTION IS SUBSTANTIAL

As construed by the Court of Appeals of the Third Appellate District in and for the State of California all non-residents are denied a privilege granted to some residents. This is an additional tax burden on the non-residents and which appellants believe denies their rights under the U.S. Constitution Art. IV Sec. 2 Par. 1.

The decision of the Court of Appeals upholding the constitutionality of the California Income Tax averaging statute is based on the Court's finding, in the Court's opinion, valid independent reasons for the disparate treatment. The Court of Appeals found, among other things, that since the California rate of taxation for non-residents is based solely on the income earned by the non-residents within California that this favorable treatment offsets the burden placed on the non-resident who is denied income averaging. In comparison, the California resident has his tax rate determined by his total income regardless of where it is earned. The Court in its opinion points out how the rate of the non-resident could have been determined by considering all the non-residents' income regardless of where it was earned and whether taxable or not by the state. **Maxwell v. Bugbee**, 250 U.S. 525 (1919)

The Court in its decision looks to the comparable sections in the Federal Code as justification for the taxing

scheme. 26 U.S.C. Sec. 1303 (a) and (b)

As was argued in that Court by the appellant: although the California provisions have been drafted similarly to the Federal provisions, the situation is distinguishable because aliens are not protected by the U.S. Constitution's privileges and immunities clause which was specifically drafted to protect residents of foreign states from being treated differently from residents without further reason.

Appellants' thrust is that with a patently invalid statute under the doctrine of **Travis v. Yale and Towne Manufacturing Co.**, 252 U.S. 60 (1919), that the state must under a doctrine declared in **Mullaney v. Anderson** 342 U.S. 415 (1952) somehow equate or approximately equate the additional burden placed on the non-resident taxpayer to the expense or burden on the taxing state.

VIII

CONCLUSION

Wherefore it is respectfully submitted that this Court has jurisdiction of this appeal under Sec. 1257 Title 28, United States Code.

JOHN P. DAVIS
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In propria persona

APPENDIX

John P. Davis
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Attorney for Plaintiffs and Appellants

IN THE COURT OF APPEALS
FOR THE THIRD APPELLATE DISTRICT
FOR THE STATE OF CALIFORNIA

JOHN P. DAVIS and NINA J. DAVIS,
Appellants,

v.

FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA,
Respondent.

Filed Oct. 31, 1977

3 CIV 16487

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

I

Notice is hereby given that JOHN P. DAVIS, in propria persona, appeals to the United States Supreme Court the judgment of the Superior Court of the State of California in and for the County of Sacramento, filed on November 15, 1976, finding Sec. 18243 of the California Revenue and Taxation Code was not unconstitutional under the United States Constitution Art. IV Sec. 2 Par. 1. Said judgment being affirmed by the Court of Appeals of the Third Appellate District (3 CIV 16487) on July 26, 1977 with petition of hearing in the California Supreme Court being denied on September 22, 1977. This appeal is taken pursuant to 28 U.S.C. Sec. 1257 (2).

II

The clerk will please prepare a transcript of the record in this court for transmission to the Clerk of the Supreme Court of the United States and include in said transcript:

Those documents in the Clerk's transcript on Appeal to the Court of Appeals in and for the Third Appellate District with the filings, papers subsequent to this filed with the Court of Appeals and in the Supreme Court of California.

III

The sole question on appeal is the constitutionality of the aforesaid California Revenue and Taxation Code Provision.

(s) JOHN P. DAVIS,
In propria persona

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
IN AND FOR THE
THIRD APPELLATE DISTRICT
(Sacramento)

JOHN P. DAVIS and NINA J. DAVIS,

Plaintiffs and Appellants

v.

FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA,

Defendant and Respondent.

Filed July 26, 1977

3 Civil 16487
(Super. Ct. No. 260656)

APPEAL from a judgment of the Superior Court of Sacramento County, Charles W. Johnson, Judge. Affirmed.

John P. Davis, in propria persona, for Plaintiffs and Appellants.

Evelle J. Younger, Attorney General, Derry L. Knight, Deputy Attorney General, for Defendant and Respondent.

Plaintiffs challenge the constitutionality of section 18243 of the California Revenue and Taxation Code, which denies to non-Californians the option of income averaging in computing their California income tax. They charge that the denial violates the privileges and immunities clause of article VI, section 2 of the Federal Constitution. ("The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.")

Plaintiffs were California residents for at least four years before moving to Nevada in September 1972. They filed resident state income tax returns for the years 1969 through 1972. For the tax year 1973 plaintiffs filed a nonresident return covering income received from California sources. They sought a refund of $1,760.42, that amount being the saving available to them had they been permitted to average their 1973 California income. The Franchise Tax Board and the State Board of Equalization denied their claim. The trial court sustained the taxing agencies and plaintiffs appeal.

Income averaging is described as an elective method of computing income tax by an individual who has an unusually large income in the current tax year (computation year) as compared with the four preceding years (the base period). (RIA Tax Coordinator, Par. G-8000 et seq; 33 Am.Jur.2d, Federal Taxation, Sec. 2950, p. 652.) In general, the California version permits an eligible individual whose current year's income exceeds his average, annual base-period income by more than one-third to elect to have the excess taxed at the lower rates applying to one-fifth of that amount. (Rev. & Tax. Code, Sections 18241-18242.) Eligibility for income averaging is restricted to taxpayers who were California residents during the five years comprising the current tax year and the base period. (Rev. & Tax. Code, Sec. 18243.)

These provisions were modeled after income averaging provisions of the federal income tax law. The latter denies eligibility to anyone who was a nonresident alien at any time during the five-year period. (26 U.S.C. Sec. 1303 (a) and (b).)

The privileges and immunities clause bars discrimination against citizens of other states where nonresidence is the only substantial reason for the differential; it does not preclude disparity of treatment where there are "valid, independent reasons" for it; the inquiry in each case is whether independent reasons actually exist and whether the degree of discrimination bears a close relation to them. (Toomer v. Witsell (1947)

334 U.S. 385, 396; Travis v. Yale & Towne Manufacturing Co. (1920) 252 U.S. 60, 78-81; Addison v. Addison (1965) 62 Cal.2d 558, 569.) A state tax law may accord differential treatment to nonresidents if it is directed at a reasonably fair distribution of burdens and does not intentionally discriminate. (Shaffer v. Carter (1920) 252 U.S. 37, 56-57.) If, as in the "commuter tax" cases, the state law's objective is taxation of nonresidents at a higher level than residents, it offends the principle of comity embedded in the privileges and .immunities clause. (Austin v. New Hampshire (1975) 420 U. S. 656, 666; Travis v. Yale & Towne Manufacturing Co., supra)

The appeal, then, turns on the existence of a valid independent reason for denying income averaging to nonresidents of California. The state has advanced several reasons, only one of which need be considered.

Parity of treatment is the objective of the income averaging option. California's graduated income tax law imposes rates increasing to 11 percent on ascending brackets of taxable income. (Rev. & Tax. Code, Sec. 17041). The progression of brackets imposes a heavy burden on taxpayers who achieve an abnormally high income in a single year as compared with taxpayers of relatively stable income. Averaging is designed to bring taxpayers of widely fluctuating income into a position of approximate parity with those of relatively stable income. (H. R. Rep. No. 749, 88th Cong., 1st Sess. (1963) (Vol. 1, 1964, U.S. Code Cong. & Ad. News, pp. 1418-1419).)

A state may constitutionally tax the income of its residents wherever earned as well as the income of nonresidents derived from sources within the state. (New York ex. rel. Cohn v. Graves (1937) 300 U.S. 308, 313; Travis v. Yale & Towne Manufacturing Co., supra, 252 U.S. at pp. 75-76; Shaffer v. Carter, supra, 252 U.S. at pp. 52-53.) Although California residents and nonresidents are subject to the same graduated tax rates, the tax brackets applicable to the latter are determined only by income from sources within California. (Rev. & Tax. Code, Sec. 17041.) The personal income tax law restricts the

nonresident's gross income to that derived from California sources. (Rev. & Tax. Code, Sec. 17951.) Thus, California has chosen to ignore out-of-state income in finding a nonresident's tax bracket. Unlike a resident, the nonresident receives the benefit of a tax bracket which is not proportioned to his total ability to pay. (See Hellerstein, **Some Reflections on the State Taxation of a Nonresident's Personal Income**, 72 Mich. L.Rev. 1309, 1337-1338 (1974).)

California's choice is not constitutionally compelled. "When the state levies taxes within its authority, property not in itself taxable by the state may be used as the measure of the tax imposed." (Maxwell v. Bugbee (1919) 250 U.S. 525, 539; see Great Atl. & Pac. Tea Co. v. Grosjean (1937) 301 U.S. 412, 424-425; Lowndes, **Rate and Measure in Jurisdiction to Tax**, 49 Harv.L.Rev. 756 (1936); Hellerstein, **op.cit.**, 72 Mich L.Rev. at p. 1335, fn. 119.)

In order to invoke income averaging, a resident taxpayer must display his entire, five-year income history. The nonresident need not. If income averaging were available to him, the nonresident could display a fluctuating California income as a cloak for non-fluctuating total income. He could lawfully relegate his non-California, base-period income to silence, even when it is high enough to reduce or eliminate its disparity with current, computation-year income. He could exhibit an inflated, computation-year California income even though his total income had not increased. Income averaging is optional. A nonresident taxpayer's ability to isolate his California income for averaging would provide him more options than a resident taxpayer. His need for the parity of treatment sought by income averaging remains unknown, for he need not show foreign, nontaxable income. The latter may nullify his equitable entitlement to income averaging.

The federal income averaging provisions exhibit congressional awareness that foreign, nontaxable income may offset the taxpayer's equitable entitlement for

income averaging. If a federal taxpayer chooses to average his income for the current tax year, he may not avail himself of the law's exemptions for income earned either from sources outside the United States or from sources within the posssessions of the United States. (26 U.S.C. Sec. 1304 (b)(3) and (4).)

Instead of forcing the nonresident to show out-of-state income as a condition of income averaging, California has chosen to deny him the option. The denial is consistent with the state's general policy of ignoring out-of-state income as a factor in progressive taxation. The nonresident isolates his California income for the purpose of finding his tax bracket. Ability to indulge in income averaging would multiply his opportunities to find a tax bracket ill suited to the goal of tax parity. Superimposed upon California's system of ignoring the nonresident's out-of-state income, averaging would permit him to distort his five-year income history; simultaneously it would deny the state the means of discerning between real and fictitious fluctuations. These factors provide a valid reason, independent of the mere fact of nonresidency, for denying income averaging to nonresidents.

Plaintiffs are in an idiosyncratic position. They were residents of California for three years and nine months and nonresidents for one year and three months of the five-year period. The law denies averaging to a taxpayer who was a nonresident "at any time" during the computation year or the base-period. (Rev. & Tax. Code, Sec. 18243(b).) Plaintiffs' nonresidency during 1973, the computation year, supplies them only a limited ability to distort their income fluctuations. The practical possibilities of distortion dwindle in direct ratio to the span of nonresidency. Nevertheless, an occasional or accidental inequality due to circumstances personal to the taxpayer will not invalidate a nondiscriminatory general rule. (Travis v. Yale & Towne Manufacturing Co., supra, 252 U.S. at pp. 80-81; Maxwell v. Bugbee, supra, 250 U.S. at p. 543; see also, Morey v. Doud (1957) 354 U.S. 457, 463-464.)

Judgment affirmed. (CERTIFIED FOR PUBLICATION.)

FRIEDMAN, J.

We concur:

PUGLIA, P.J.

REGAN, J.

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Filed Nov. 15, 1976

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY
OF SACRAMENTO

JOHN P. DAVIS AND NINA J. DAVIS,
Plaintiffs,

v.

FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA,
Defendant.

NO. 260656

JUDGMENT

This cause came on regularly for trial on October 27, 1976, in Department No. 7 of the above-entitled court, the Honorable Charles W. Johnson, Judge, presiding, sitting without a jury, a jury having been duly waived. Plaintiffs appearing by attorney-plaintiff John P. Davis and defendant appearing by attorney Derry L. Knight, Deputy Attorney General, and evidence and arguments both oral and documentary having been presented by both parties and the cause having been submitted for decision and the court having issued its Notice of Intended Decision with no request for findings of fact and conclusions of law having been filed.

IT IS ORDERED, ADJUDGED AND DECREED that

plaintiffs John P. Davis and Nina J. Davis take nothing by this complaint from defendant Franchise Tax Board and that defendant Franchise Tax Board have and recover from plaintiffs John P. Davis and Nina J. Davis costs and disbursements, amounting to the sum of $10.00.

DATED: November 15, 1976

(s) Chas. W. Johnson
Judge of the Superior Court

ATTEST:
A. Simpson, Clerk
By C. Walker
Deputy Clerk

Judgment entered on November 15, 1976 in Judgment Book Vol. , page

(s) J.A. Simpson
Clerk
By (s) P. Anderson
Deputy

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 77-842

JOHN P. DAVIS and
NINA J. DAVIS,

Appellants,

vs.

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Appellee.

MOTION TO DISMISS OR AFFIRM

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In The
Supreme Court of the United States

October Term 1977

No. 77-842

JOHN P. DAVIS and
NINA J. DAVIS,

Appellants,

vs.

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Appellee.

MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, hereby moves this Court to dismiss this appeal or to affirm the decision of the California Court of Appeal, for the following reason:

This case does not present a substantial federal question.

Introductory Statement and Summary of Argument

The California Supreme Court denied hearing in this matter and thus let stand the carefully considered opinion of the California Third District Court of Appeal

which is reported at 71 Cal.App.3d 998. The District Court of Appeal decision herein is in complete accord with the decisions of this Court and of the California Courts, and fully disposed of the arguments of appellants herein.

Appellants contend that California Revenue and Taxation Code [1] section 18243 violates rights protected under the Privileges and Immunities Clause of the United States Constitution (Art. IV, § 2, Cl. 1), since it denies income averaging to nonresidents but not to residents of California. Appellants contend that section 18243 is invalid under the reasoning set forth in this Court's decisions in *Travis* v. *Yale & Towne Mfg. Co.* (1920) 252 U.S. 60, 405 S.Ct. 228, 64 L.Ed. 460 and *Mullaney* v. *Anderson* (1952) 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458. Appellants contend that these decisions require the State to equate the additional burden placed on the nonresident taxpayer to the expense or burden on the taxing state.

It is respectfully urged that appellants have misread *Travis* and *Mullaney*. When read in their entirety it is apparent that these decisions stand only for the proposition that there must exist valid independent reasons for denying income averaging to nonresidents of California. The California income averaging residency requirements, as found by the California District Court of Appeal, *are* supported by valid and reasonable grounds which justify any resultant diversity of

[1] Hereinafter all references are to the California Revenue and Taxation Code unless otherwise specified.

treatment. The Court of Appeal found that the residency requirement insures parity of treatment between persons with fluctuating incomes, the very objective of income averaging. Facility of administration is also enhanced by the requirement, which is an additional ground justifying any difference in treatment which may result from the income averaging residency requirements. Furthermore, the effect of the possible discrimination is no more onerous with respect to nonresidents than residents, e.g., if any resident has been in the state for less than the full five year period he too may not use the income averaging method.

ARGUMENT

I

INTRODUCTION

For the reasons relied upon by the California Court of Appeal, plus those further detailed below, any diversity of treatment occasioned by the California income averaging residency requirements does not infringe upon the Privileges and Immunities Clause as interpreted by this Court.

II

CALIFORNIA INCOME AVERAGING PROVISIONS

California's income averaging provisions are optional

(§ 18244[a]) and are contained in sections 18241 through 18246. The purpose of the income averaging provisions is set forth in the California Administrative Code, as follows:

> "In effect, these sections generally treat the income as having been included in gross income ratably over the years (preceding receipt or accrual) in which it was earned. However, these sections have no effect on the income tax liability for prior taxable years; they simply provide a special method of computing the amount of tax for the year of receipt or accrual." 18 Cal.Admin.Code § 18241 (a).

Since appellants were nonresidents during a portion of one base year (September 1972 through December 31, 1972) and for the entire computation year of 1973 (§ 18242 [d]), section 18243 expressly prevented them from using the income averaging method.

III

THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION REQUIRING THIS COURT'S REVIEW

A. The California Income Averaging Residency Requirements are Enacted As A Valid Exercise of the Legislature's Right of Classification and Are Not in Violation Of the Privileges and Immunities Clause Of the United States Constitution

1. This Court's Interpretation of The Privileges and Immunities Clause Does Not Mandate Precise Equality of Taxation Between Residents and Nonresidents

Appellants assert that California's residency provisions infringe rights guaranteed them by article IV, section 2, clause (1) of the United States Constitution, the Privileges and Immunities Clause, which states in pertinent part the following:

> "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

It should be emphasized preliminarily that when resolving constitutional challenges to state tax measures, this court has made it clear that "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Austin* v. *New Hampshire* (1975) 420 U.S. 656, 95 S.Ct. 1191, 1195, 43 L.Ed.2d 530; *Madden* v. *Kentucky* (1940) 309 U.S. 83, 60 S.Ct. 406, 408, 84 L.Ed. 590; See also *Christman* v. *Franchise Tax Bd.* (1976) 64 Cal.App.3d 751, 762. In addition, "The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Madden* v. *Kentucky, supra,* 309 U.S. 83, 88, 60 S.Ct. 406, 408, 84 L.Ed. 590; *Richfield Oil Corp.* v. *Franchise Tax Bd.* (1959) 169 Cal.App.2d 331, 335–336.

This Court has made it emphatically clear that the Priviliges and Immunities Clause is not an absolute. In the case of *Toomer* v. *Witsell* (1948) 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460, the Court said:

> "Like many other constitutional provisions, the privileges and immunities clause *is not an absolute.* It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are

citizens of other States. *But it does not preclude disparity of treatment* in the many situations *where there are perfectly valid independent reasons for it.* Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them (footnote omitted). *The inquiry must* also, of course, *be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.*" (Emphasis added.) *Toomer, supra,* 334 U.S. 385, 396. *See also, Addison* v. *Addison* (1965) 62 Cal.2d 558, 568–569.

Recent cases have continued to recognize that the Privileges and Immunities Clause is not an absolute. In *Montgomery* v. *Douglas* (1974) 388 F.Supp. 1139, affirmed (1975) 422 U.S. 1030, 95 S.Ct. 2645, 45 L.Ed.2d 687, the Court upheld as constitutional Colorado's twelve-month domiciliary tuitional requirement, stating the following:

"Colorado has reasonably attempted through its legislation to distinguish those students who sincerely intend to remain in Colorado from those who do not in order to give the former the opportunity to attend its institutions of higher learning on a subsidized tuition basis. . . .

"The statute is also reasonably related to the legitimate interest of the state in ensuring that those who pay in-state tuition rates have made and will make some contribution to the state before entitlement to in-state student status." *Montgomery* v. *Douglas, supra,* 388 F.Supp. 1139, 1146, affirmed on appeal, 422 U.S. 1030, 95 S.Ct. 2645, 45 L.Ed.2d 687.

See also American Commuters Association v. *Levitt* (C.A.N.Y. 1969) 405 F.2d 1148 and *Kirk* v. *Regents of University of California* (1969) 273 Cal.App.2d 430; appeal dismissed, (1970) 396 U.S. 554, 90 S.Ct. 754, 24 L.Ed.2d 747.

The case of *Austin* v. *New Hampshire, supra,* (1975) 420 U.S. 656, 95 S.Ct. 1191, 43 L.Ed.2d 530, which held the New Hampshire Commuter's Income Tax unconstitutional, was a case where there simply was no independent basis whatsoever for the discrimination between residents and nonresidents. Such is not the case, as will be discussed below, with respect to California's income averaging residence requirements. *See also, Pennsylvania* v. *New Jersey* (1976) 426 U.S. 660, 96 S.Ct. 2333, 49 L.Ed.2d 124.

2. Valid and Reasonable Grounds Justify Any Diversity of Treatment Occasioned by the Residency Requirement of Section 18243.

(a) Introduction.

Since California's income averaging law was modeled on similar federal provisions (see Int. Rev. Code of 1954, §§ 1301–1305; 26 U.S.C. 1301 et. seq.), the federal legislative purpose is pertinent in determining the California Legislature's purpose in enacting nearly identical statutes. *Innes* v. *McColgan* (1941) 47 Cal.App.2d 781, 784; *Union Oil Associates* v. *Johnson* (1935) 2 Cal.2d 727, 734–735.

Federal legislative intent relative to the general reasons for enactment of income averaging legislation has been explained as follows:

"A general averaging provision *is needed to accord those whose incomes which fluctuate widely from year to year the same treatment accorded those with relatively stable incomes.* Because the individual income tax rates are progressive, over a period of years those whose incomes vary widely from year to year pay substantially more in income taxes than others with a comparable amount of total income but spread evenly over the years involved. This occurs because the progressive rates take a much larger proportion of the income in taxes from those whose incomes in some years are relatively high. . . .

". . . . . .

"Income averaging in your committee's view, should be designed to treat everyone as nearly equally for tax purposes as possible, without regard to how their income is spread over a period of years and without regard to the type of income involved. At the same time, *it is necessary to have any income averaging device in a form which is workable,* both from the standpoint of the taxpayer and the Internal Revenue Service." (Emphasis added.) House Report No. 749, 88th Cong. 2d Sess. (1963), Vol. 1, 1964 U.S. Code Cong. & Ad. News, pp. 1418–1419.

The following explanation of the federal eligibility requirements appears in the House report:

"*To be eligible for averaging, one of the principal concerns is that the individual's income must have been subject to tax by the United States throughout the entire base period as well as the computation year.* No one is eligible for averaging who was a nonresident alien in any of the 4 base period years or in the computation year. *In addition, even though a citizen in the computation year, the individual must*

be claiming no exclusion in that year for income earned abroad . . . .

"*A second concern* of this provision *is that the individual be a member of the labor force* in both the computation year and in the 4 base period years. . . ." (Emphasis added.) House Report No. 749, 88th Cong., 2d Sess. (1963), Vol. 1, 1964 U.S. Code Cong. & Ad. News, p. 1428; *see also* Senate Report No. 830, 88th Cong., 2d Sess. (1963), Vol. 1, 1964 U.S. Code Cong. & Ad. News, p. 1818.

The same purpose and concerns were necessarily also adopted by the California Legislature in enacting similar provisions.

(b) *Insuring the Parity of Treatment Sought by Income Averaging*

Although California residents and nonresidents are subject to the same graduated tax rates, the tax brackets applicable to the latter are determined only by income from sources within California. § 17041. The personal income tax law restricts the nonresident's gross income to that derived from California sources. § 17951. Thus, California has chosen to ignore out-of-state income in finding a nonresident's tax bracket. Unlike a resident, the nonresident receives the benefit of a tax bracket which is not proportioned to his total ability to pay.

As pointed out above (III-A-2(a)), parity of treatment is the objective of the income averaging option. Absent the residency requirement, this objective of parity would be completely eliminated. The California Court of Appeal in this case quite properly found this possible consequence alone to be a sufficient independent

reason for sustaining the residency requirement. The court stated in pertinent part the following:

> "In order to invoke income averaging, a resident taxpayer must display his entire, five-year income history. The nonresident need not. If income averaging were available to him, the nonresident could display a fluctuating California income as a cloak for non-fluctuating total income. He could lawfully relegate his non-California, base-period income to silence, even when it is high enough to reduce or eliminate its disparity with current, computation-year income. He could exhibit an inflated, computation-year California income even though his total income had not increased. Income averaging is optional. A nonresident taxpayer's ability to isolate his California income for averaging would provide him more options than a resident taxpayer. His need for the parity of treatment sought by income averaging remains unknown, for he need not show foreign, nontaxable income. The latter may nullify his equitable entitlement to income averaging.
> "
> . . . . . .
> "The nonresident isolates his California income for the purpose of finding his tax bracket. Ability to indulge in income averaging would multiply his opportunities to find a tax bracket ill suited to the goal of tax parity. Superimposed upon California's system of ignoring the non-resident's out-of-state income, averaging would permit him to distort his five-year income history; simultaneously it would deny the state the means of discerning between real and fictitious fluctuations. These factors provide a valid reason, independent of the mere fact of

> nonresidency, for denying income averaging to nonresidents." 71 Cal.App.3d 998, 1003, set forth in Appellants' Jurisdictional Statement, Appendix, pp. vi-vii.

It is clear that such preferential treatment for nonresidents is not required by the Constitution. See *Shaffer* v. *Carter* (1920) 252 U.S. 37, 53, 40 S.Ct. 221, 64 L.Ed. 445.

(c) *Facilitating Administration.*

In California, residency for the requisite five years also facilitates the administration of the income averaging law since appellee is in a much better position to ascertain and verify pertinent facts such as income earned, marital status, support received, etc., with respect to its own residents than for nonresident individuals. *See Maxwell* v. *Bugbee* (1919) 250 U.S. 525, 542-543, 40 S.Ct. 2, 63 L.Ed. 1124.

In that regard, it is noteworthy that respondent's investigative subpoena power (§ 19254; Cal. Gov. Code § 11181(e)), and administrative collection powers of Order to Withhold (§ 18817) and warrant (§ 18906), do not extend beyond California's borders. Cal. Gov. Code §§ 200 and 270. Liens recorded or filed by appellee likewise apply only to property within California. § 18881 et seq.

In the case of *Madden* v. *Kentucky, supra,* 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590, this Court found that ease of collection warranted an *ad valorem* tax on residents with deposits in banks outside the State of Kentucky at a rate five times that on deposits in banks located in the

state. Although deposits in out-of-state banks by residents of Kentucky would obviously be thereby discouraged, it was found that the ease of collection warranted the distinction.

(d) *Assuring That Taxpayer Was Member of State Labor Force*

Finally, the residency requirement finds justification in the fact that it makes it much more likely that the taxpayer was a member of the labor force and therefore a taxpayer and contributor to the state's economy. See *Kirk* v. *Regents of University of California, supra,* (1969) 273 Cal.App.2d 430; appeal dismissed, (1970) 396 U.S. 554, 90 S.Ct. 754, 24 L.Ed.2d 747; and 18 Cal.Admin.Code §§ 17014–17016(b).

3. Appellants' Arguments Have Been Raised and Properly Rejected, There Being Valid Reasons Independent of Nonresidence For Denying Income Averaging to Nonresidents of California

In support of appellants' contention that section 18243 violates the Privileges and Immunities Clause *Travis* v. *Yale & Towne Mfg. Co., supra,* 252 U.S. 60, 40 S.Ct. 228, 64 L.Ed. 460 and *Mullaney* v. *Anderson, supra,* 342 U.S. 415, 418, 72 S.Ct. 428, 96 L.Ed. 458 are erroneously cited for the proposition that a law may be found unconstitutional unless the expense or burden placed on the taxing state is equated to the additional burden placed on the nonresident taxpayer. These decisions instead stand only for the proposition that there must exist valid independent reasons for denying income

averaging to nonresidents of California.

Mullaney relied upon *Toomer* v. *Witsell,* elaborated upon above at III-A-1, in establishing the guidelines for applying the Privileges and Immunities Clause. The Court's holding, quoted in context, is as follows:

> *"Constitutional issues affecting taxation do not turn on even approximate mathematical determinations.* But something more is required than bald assertion to establish a reasonable relation between the higher fees [to nonresident fishermen] and the higher cost to the Territory. *We do not remotely imply that the burden is on the taxing authorities to sustain the constitutionality of a tax.* But where the power to tax is not unlimited, validity is not established by the mere imposition of a tax. In this case, respondents negatived other possible bases raised by the pleadings for the discrimination, and the one relied on by the Commissioner, higher enforcement costs, was one as to which all the facts were in his possession. Respondents sought to elicit these facts by interrogatories and cross-examination without avail. Under the circumstances we think they discharged their burden in attacking the statute." (Emphasis added.) *Mullaney* v. *Anderson, supra,* 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458.

In this case appellee has established that reasonable grounds exist which justify any resultant diversity of treatment. Appellant has entirely failed to negative any of the grounds set forth. *Mullaney* therefore does not add support to appellants' position. It is apparent that *Mullaney,* similar to the "commuter" tax cases *(Austin* v. *New Hampshire, supra,* 420 U.S. 656, 95 S.Ct. 1191, 43

L.Ed.2d 530), was a case where the state's primary objective was taxation of nonresidents at a higher level than that for residents. This offends the principle of comity imbedded in the Privileges and Immunities Clause. The California income averaging residency requirements, on the other hand, as properly found by the California Court of Appeal, are supported by valid and reasonable grounds which justify any resultant diversity of treatment.

IV
CONCLUSION

In conclusion, there are valid independent reasons which justify the California residency requirements for income averaging, thus complying with the Privileges and Immunities Clause. Insuring the parity of treatment sought by income averaging, as found by the Court of Appeal, is alone sufficient justification. In addition, facility of administration is a reasonable ground for any discrimination which may result from the income averaging residency requirements. Furthermore, the effect of the possible discrimination is no more onerous with respect to nonresidents than residents, e.g., if any resident has been in the state for less than the full five-year period he too may not use the income averaging method.

On balance, California's residency requirements for income averaging purposes are an equitable exchange for the privilege of income averaging and do not infringe upon appellants' constitutional privileges and

immunities, which constitutional right is not absolute. To eliminate the residency requirements would grant certain taxpayers who were nonresidents during a portion of the base or computation periods a distinct advantage over similarly situated resident taxpayers. Such a result, of course, is not dictated by the United States Constitution.

Based on the foregoing, it is respectfully urged that this Court dismiss appellants' appeal, there being a failure to present a substantial federal question as required by Rules 15 and 16 of the Rules of the Supreme Court of the United States, or, in the alternative, affirm the decision of the California Court of Appeal.

Respectfully submitted,

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